



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 9, 1996

Mr. Jeffrey J. Horner
Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR96-1098

Dear Mr. Horner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 31846.

The Galena Park Independent School District (the "school district"), which you represent, received a request for several records, including the following:

1. The number of complaints and copies of each complaint made against Mr. D. Mickelson, a teacher with the school district.
2. A copy of [Mr. Mickelson's] employment record.
3. A record of [Mr. Mickelson's] previous employer.
- ...
7. Employment records of Principal Mrs. Corliss Rogers.

You state that the school district has released to the requestor all of the requested information except information responsive to these four requests. You indicate that the district does not possess records responsive to the third request. Chapter 552 of the Government Code does not require a governmental body to make available nonexistent information. Open Records Decision No. 362 (1983) at 2. Thus, we will consider only whether the school district must release to the requestor information sought in the first, second, and seventh requests.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. In the last legislative session, Senate Bill 1 was passed, which added section 21.355 to the Education Code. Section 21.355 provides, "Any document evaluating the performance of a teacher or administrator is confidential." This office recently interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). We enclose a copy of Open Records Decision No. 643 (1996) for your information. In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643 (1996), we conclude that certain of the documents submitted to this office for review are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the school district must withhold these documents. We have marked these documents for your convenience.

You claim that sections 552.101 and 552.102 of the Government Code except the remainder of the requested information from required public disclosure. We are aware of four statutory sources of privacy that are or may be applicable to portions of the requested information. First, section 5.08(b) of the Medical Practices Act, V.T.C.S. article 4495b, deems confidential "[r]ecords of the . . . diagnosis, evaluation, . . . of a patient by a physician that are created . . . by a physician." Such records may not be disclosed except in accordance with article 4495b, section 5.08.

In the employment information related to Ms. Rogers, we found one record that appears to be a record of the diagnosis or evaluation of a patient by a physician; furthermore, the record appears to have been created by a physician. This record may be released only as provided for by section 5.08(b) of the Medical Practices Act. We have marked the medical record for your convenience.

Second, we note that throughout the requested information, the social security numbers of Mr. Mickelson and Ms. Rogers appear. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994) at 3. Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that

section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.¹

Some of the information may be confidential under federal law. This office has concluded that information collected under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the "ADA"), from an applicant or employee concerning that individual's medical condition and medical history is confidential under section 552.101 of the Government Code, in conjunction with provisions of the ADA. Open Records Decision No. 641 (1996). This type of information must be collected and maintained separate from other information and may be released only as provided by the ADA. We enclose a copy of Open Records Decision No. 641 (1996) for your information. If any of the information on the enclosed applications was collected under the ADA, the school district must withhold it pursuant to the reasoning in Open Records Decision No. 641 (1996).

Finally, the submitted documents include an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under chapter 552 of the Government Code would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 of the Open Records Act and may only be released in compliance with the federal laws and regulations governing the employment verification system.

In addition to statutory sources of privacy, section 552.101 incorporates the doctrine of common-law privacy.² Under the doctrine of common-law privacy, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 (1992) at 1.

¹The Seventy-fourth legislature significantly amended chapter 552 of the Government Code effective September 1, 1995. *See* Act of May 20, 1995, 74th Leg., R.S. The legislature amended section 552.024(a) of the Government Code to provide that an employee may choose whether to allow public access to his or her social security number and information regarding the employee's family, in addition to the employee's home address and home telephone number. We do not address in this ruling whether any amendment to chapter 552 will affect requests for information that are made on or after September 1, 1995.

²Section 552.101 also incorporates constitutional privacy, but we are unaware of any grounds on which the requested information is confidential under either the federal or state constitution. *See* Open Records Decision No. 600 (1992) at 4-5 (explaining two kinds of individual privacy interests protected by federal constitution). We note that the scope of constitutional privacy is narrower than that of common-law privacy.

We have examined the requested information, and we have found nothing private under the common law. In particular, we note that the job-related examination scores of a public employee or an applicant for public employment, such as those found on the ExCET Examinee Score Report, are not private under common law. See Open Records Decision No. 441 (1986) at 2. Common-law privacy also does not protect the amount of a public employee's salary; such information does not pertain to the employee's private affairs, and the public has a legitimate interest in it. See *Industrial Found.*, 540 S.W.2d at 685.

We next consider whether the district may withhold any of the requested information pursuant to section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. As we have determined that none of the requested information is private under common-law privacy, we likewise determine that section 552.102(a) does not authorize the school district to withhold any of the requested information from the requestor.³

Section 552.102(b) excepts from disclosure a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, with the exception of the degree obtained and the curriculum. The school district must edit from the transcript all information other than the employee's name, the degree obtained, and the courses taken. Open Records Decision No. 526 (1989) at 2-3. For your convenience, we have marked the information the district must withhold.

You did not raise section 552.117 of the Government Code, which excepts from disclosure a public employee's home address and home telephone number.⁴ Section 552.117 requires you to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the employee had not made a request for confidentiality under section 552.024 at the time this request for the documents was made. Whether a

³Because the requestor is not either of the employees whose employment information is requested here, we need not consider whether the exception to section 552.102(a) applies.

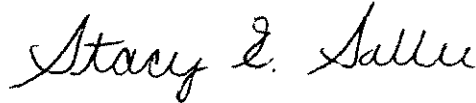
⁴See footnote 1 for a discussion of the Seventy-fourth Legislature's amendments to section 552.024 of the Government Code. The legislature similarly amended section 552.117 to permit a public employee to choose to withhold the employee's social security number and information regarding the employee's family. Because the amendment to section 552.117 was not effective until September 1, 1995, we need not consider its applicability here.

particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5. Note that section 552.117(1)(A) excepts from required public disclosure a public employee's former home addresses and home telephone numbers if the employee has made the election to keep this information confidential. See Open Records Decision No. 622 (1994) at 6.

Finally, two documents in Ms. Rogers' personnel file do not relate to her. These documents are not responsive to the request, and the school district need not release them to the requestors here. For your convenience, we have marked these nonresponsive documents.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 31846

Enclosures: Open Records Decision No. 643 (1996)
Open Records Decision No. 641 (1996)
Marked documents